

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WATER COUNCIL

**RECEIVED**

SEP 29 2005

**Appeal of Daniel Osborn  
Map 22, Lot 57, Atkinson, New Hampshire**

05- 17 WC

**APPEAL OF DENIAL OF  
SHORELAND PROTECTION VARIANCE**

NOW COMES Daniel Osborn, and through his attorneys, Beaumont & Campbell Prof. Ass'n., hereby Appeals the denial of his Shoreland Protection variance, stating as follows:

- 1) The appealing Party is Daniel Osborn with a mailing address of P.O. Box 808, Hampstead, New Hampshire 03841 (hereinafter Osborn).
- 2) Osborn is the owner of a tract of land on Big Island Pond in Atkinson, New Hampshire, designated as Map 22, Lot 57, Hemlock Shore Drive, Atkinson, New Hampshire (hereinafter the subject premises). See deed attached as Exhibit A.
- 3) That prior to 2004, the subject premises was a vacant lot of land, considered a non-conforming lot of record under RSA 483-B:10.
- 4) That in 2005, Osborn began construction of a new single family home, which conforms with the 50 ft. reference line setback as called for in RSA 483:B-9 (II) (b), after having first obtained needed variances from the Town of Atkinson Zoning Ordinance.

- 5) On or about May 5, 2005, Osborn filed a variance request under RSA 483-B:9 (V) (g), seeking a variance to allow construction of an attached deck to within 42 ft. of the reference line. See, Exhibit B attached.
- 6) By letter dated August 30, 2005, the Commissioner denied Osborn's variance request. See, Exhibit C attached.
- 7) That the Commissioner did not apply criteria for variances (See, RSA 483-B (V) (g)) to deny the Osborn request, but instead, ruled that he had no jurisdiction to entertain the request. See, Exhibit C, Paragraph #7.
- 8) That the decision of the Commissioner is erroneous as a matter of law, and therefore must be revised because:
  - (i) The provisions in RSA 483-B:9 (V) (g) authorize the Commissioner to grant variances from the "minimum standards of this section". Id. (emphasis added).
  - (ii) That the "this section" referred to is RSA 483-B:9, in its entirety.
  - (iii) That this interpretation is supported by the provisions of RSA 483-B:9 (I) which references the "standards in this section". It must refer to all of the provisions of RSA 483-B:9, because sub-section 9: (I) contains no standards.
- 9) Because the Commissioner made an error of law concerning the scope of his jurisdiction, the decision must be reversed.

Respectfully submitted,  
Daniel Osborn  
BY HIS ATTORNEYS,  
Beaumont & Campbell Prof. Ass'n.  
One Stiles Road - Suite 107  
Salem, New Hampshire 03079

Dated: September 27, 2005

**COPY**

Bernard H. Campbell, Esquire

**CERTIFICATE**

I certify that on the 27<sup>th</sup> day of September 2005, a copy of the foregoing appeal document was forwarded by First Class Mail, postage paid to:

Michael P. Nolin, Commissioner  
N.H. Department of Environmental Services  
P.O. Box 95  
Concord, New Hampshire 03302-0095

Town of Atkinson  
Board of Selectmen  
21 Academy Avenue  
Atkinson, New Hampshire 03811

**COPY**

Bernard H. Campbell, Esq.

# **EXHIBIT A**

WARRANTY DEED

I, Gardner M. Macartney, trustee of GMM REALTY TRUST, under Declaration of Trust dated December 20, 1996 and recorded with Rockingham Registry of Deeds at Book 3194, Page 0816, of North Andover, Essex County, Massachusetts

in consideration of One (\$1.00) Dollar and other good and valuable consideration

grant to Daniel J. Osborn of Atkinson, Rockingham County, New Hampshire with warranty covenants

A certain parcel of land situated in Atkinson, Rockingham County, State of New Hampshire, on the shore of Big Island Pond, and shown as Lot #16 (sixteen) of Plan of Land in Atkinson, N.H., showing "Hemlock Heights" as subdivided for R.E. Webber and F.H. Webber, dated July 1953, made by Robert W. Thorndike, surveyor, as amended in May 1954, and recorded in Rockingham County Registry of Deeds, said parcel being more particularly bounded as follows: Beginning at the Northwestern corner of said Lot 16, at a forty foot right of way running more or less parallel to the shore; thence South 600 57' West 112 Feet by lot #15 to the shore of Island Pond; thence Southeasterly by the shore of the Pond 62.8 feet to a 40 foot right of way running from the first mentioned right of way to the shore of the pond; thence South 730 9' East by said right of way 102 feet to the first mentioned right of way; thence Northwesternly by said first mentioned right of way following the curve thereof 149.58 feet to the point of beginning, (said curve having a radius of 126 feet and a tangent of 85 feet); containing 11,200 square feet, all as shown on said plan. Together with a right of way to and from the public highway over the rights of way as shown on said plan, and over the right of way therefrom to the public highway. This conveyance is given subject to the express condition for the benefit of the grantors, their heirs and assigns, and future owner of the other lots on said plan, that only a single dwelling shall be erected on any lot, together with necessary out-buildings, and that said lots shall be used for the purpose of residence only and not for purposes of trade or manufacture of any kind or description.

For grantors title see deed of Gardner M. Macartney dated December 20, 1996, and recorded with Rockingham County Registry of Deeds in Book 3194, Page 0814.

WITNESS MY HAND AND SEAL THIS 27th DAY OF JANUARY, 2004.

**COPY**  
WITNESS

Please Return to:  
RAMSEY A. BARNETT, ESQ.  
55 Main Street, P.O. Box 455  
North Andover, MA 01845-0455

**COPY**  
GARDNER M. MACARTNEY TRUSTEE  
GMM REALTY TRUST

014827

2004 FEB 27 PM 1:20

ROCKINGHAM COUNTY  
REGISTRY OF DEEDS

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

January 27, 2004

Then personally appeared before me the above-named, Gardner M. Macartney, trustee proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within document and acknowledged the foregoing statement to be his free act and deed, before me.

**COPY**

NOTARY PUBLIC

My Commission Expires: 1/17/2008

## **EXHIBIT B**



**Request for Shoreland  
Variance  
RSA 483-B:9, V(g)**

Wetlands Bureau  
P.O. Box 95, 29 Hazen Drive  
Concord, NH 03302-0095

**GENERAL INSTRUCTIONS:** Type or print clearly; missing information may delay your request. Use a separate form for each variance requested.

1. NAME OF OWNER: Osborn Daniel Joseph

Last First Middle

MAILING ADDRESS: PO Box 808 Hampstead NH 03841

Street/Box # Town/City State Zip

617-838-1233 damosborn@comcast.net

TELEPHONE FAX EMAIL

2. LOCATION OF PROPERTY FOR WHICH A VARIANCE IS BEING REQUESTED: 40 Hemlock Shore Drive Atkinson

Street/Box # Town/City

TAX MAP #s: 22 LOT #s: 57 BLOCK #s:

3. NAME OF WATERBODY: Big Island Pond

4. NAME OF APPLICANT:

(If different than owner) Last First Middle

MAILING ADDRESS: Street/Box # Town/City State Zip

TELEPHONE FAX EMAIL

5. DESCRIPTION OF VARIANCE REQUESTED:

**STANDARD:** RSA 483-B:9, V (e.g. RSA 483-B:9, V(b)(2)(A)(i) says the leachfield must be 125 feet from the reference line.)

**HOW DO YOU WISH TO VARY FROM THIS STANDARD?** Briefly describe the relief requested. (e.g. "Setback of less than 125 feet from reference line for septic system," RSA 483-B:9, V (b)(2)(A)(i).")

RSA 483-B:10 Nonconforming Lots of Record

Allow a deck to be constructed 42 feet from the primary building set back were 50 feet is required.



## **Maggie Osborn**

**From:** Maggie Osborn [damosborn@comcast.net]  
**Sent:** Tuesday, April 05, 2005 7:50 AM  
**To:** Maggie Osborn  
**Subject:** Osborn Variance Application

The literal enforcement of the standard would result in an unnecessary hardship. See Hardship Addendum.

1) Because the lot was created prior to imposition of shoreline protection standards, the standards unreasonably restrict reasonable use of property. There is no other area where a deck could be constructed. The lot is only 100 ft deep. The house has been placed as far from wetlands as possible. Which required the town to grant a variance of 26.3 ft from the front set back. Because of the slope of the lot the house could not be moved to allow deck to be built within the primary set back required. The size of the lot and design of the house doesn't allow for a deck to be placed on the side. See attached design.

2.) There would be no additional environmental impact because of construction or use of deck. No additional trees would be removed to accommodate deck. No private or public rights are being injured because no diminution in property values is expected and no additional runoff is expected to reach the adjoining surface water.

3.) Construction and use of deck is consistent with residential uses as permitted. See attached photo's of neighboring homes.

Granting a variance will not result in the diminution in value of surrounding properties. The use of the deck is consistent with residential uses permitted. See photo's.  
Deck raises the value of property and surrounding property.

The variance would not be contrary to the spirit of RSA 483-B. The construction and use of deck will not result in a negative impact to adjoining wetlands or surface water. No additional trees will be removed, deck will be constructed of environmentally friendly material. Deck will not be enclosed. Deck raises value of subject property, enhancing waterfront values in general; use is consistent with residential uses as permitted zoning.

Granting the variance would not be contrary to public interest. Wetlands set backs and uses were established after lot and its usage was created; requested use is consistent with surrounding uses. Deck will be constructed of new state of the art environmentally friendly materials. Most homes in area have decks much closer to wetlands and were constructed with environmentally threatening materials. Deck will not negatively impact adjoining wetlands or surface water.

Granting the variance would do substantial justice. The lot was originally created as a house lot in the original subdivision; other subdivisions lots have been improved and built in a similar fashion. We have gone to great lengths and expense to construct the home to have the best environmental impact possible within the wetlands. Even though the lot is a non-conforming lot of record it was important to us to move the primary structure as far from the wetlands as possible. With the help of the wetlands bureau, engineers, architects, conservation committee and town officials we were able to do so. If we could of moved the house back eight more feet to accommodate the deck we would of. Because of the steep slope of the property and its non-conforming nature we were not able to do so. There is no place else to put this deck. We need the deck to have a back exit from the main floor of the house. As most decks this will be off the kitchen area. Not granting the variance will restrict us from normal uses of the house and backyard. It will also penalizes us for meeting the primary set back when not required of a non-conforming lot. It is our understanding that if trees are not being removed to construct the deck and that the deck will not be enclosed there will be no additional impact on the wetlands. The deck will be consistent with residential uses in the area.

4/5/2005

**Osborn Variance Application**  
**Map 22 Lot 57**

**HARDSHIP ADDENDUM**

The Applicant in this case is seeking dimensional (area) variance. Therefore, the hardship criteria are as set forth in the Supreme Court decision of Boccia vs. City of Portsmouth, \_\_\_\_\_ N.H. \_\_\_\_\_ (5/25/04).

- 1) An area variance is required to enable the Applicant's proposed use of the property given the special condition of the property:

This lot was created prior to zoning and is similar in size to other lots in Hemlock Heights and is, in fact, larger than many other waterfront lots. Without the setback relief, the lot cannot be used for any purpose, because the 100-foot setback and street setbacks nearly overlap.

- 2) The benefit sought by the Applicant cannot be achieved by some other method reasonably feasible for the Applicant to pursue, other than an area variance:

The lot is pre-existing, and there is not other available land to acquire, so without the area variance, the property has no reasonable permitted uses. Likewise, the structure cannot be built without setback relief because the setback encompasses most of the lot.

6. **JUSTIFICATION FOR THE VARIANCE:** On separate pages, provide documentation of the reasons for the necessity of the requested variance. Plans and photographs should be attached as part of your explanation. Describe what reasonable use of your property you would be denied if you had to comply with the literal meaning of the standard. An example would be a lot-of-record in which the only reasonable location for constructing a septic system is closer to the reference line because of the physical features of the property. Your narrative must address each of the following points:

- ***The literal enforcement of the standard would result in an unnecessary hardship.*** To establish unnecessary hardship you must prove that the standard for which you are requesting the variance:
  1. Would interfere with the reasonable use of the property, considering the unique setting of the property in its environment.
  2. Has no fair and specific relationship between the general purposes of RSA 483-B and the restrictions on your property.
  3. Does not injure the public or private rights of others when applied to your property.
- ***Granting a variance will not result in the diminution in value of surrounding properties.*** You must demonstrate that granting the variance would not cause diminution of surrounding property values. To do this, you must show that the variance is consistent with the existing neighborhood and adjoining shoreline, will not result in a nuisance, and will not diminish the reasonable use of neighboring properties.
- ***The variance would not be contrary to the spirit of RSA 483-B.*** RSA 483-B:2 declares that the standards are necessary to protect the public waters of the State of New Hampshire, and lists 16 specific purposes for those standards. You must show that a variance, as applied to your specific property, would not be contrary to any of those purposes.
- ***Granting variance would not be contrary to the public interest.*** The public waters of New Hampshire are valuable resources held in trust by the State, and the public has an interest in protecting those waters and shorelines from degradation. You must show that a variance would not interfere with the greater public benefit.
- ***Granting variance would do substantial justice.*** You must show that granting the variance would be a fair and reasonable decision. One way to do this is to show that, in combination with mitigating measures, the net result will have the same or greater protection for the public water as meeting the standard itself. Mitigating measures include providing additional protections above and beyond the minimum standards. For example: Re-establishing a natural woodland buffer along a section of shoreline that was cleared prior to the enactment of RSA 483-B could be used to balance the impact of a septic system being built closer to the public water. Merely meeting the requirements of another standard or jurisdiction would not be considered a mitigating measure.

7. **SIGNATURES:** The signature(s) below certifies that a copy of this application, with all attachments, has been provided to the municipal conservation commission in the city or town where the property is located (or selectmen if there is no conservation commission), and that the information provided is true and accurate.

OWNER

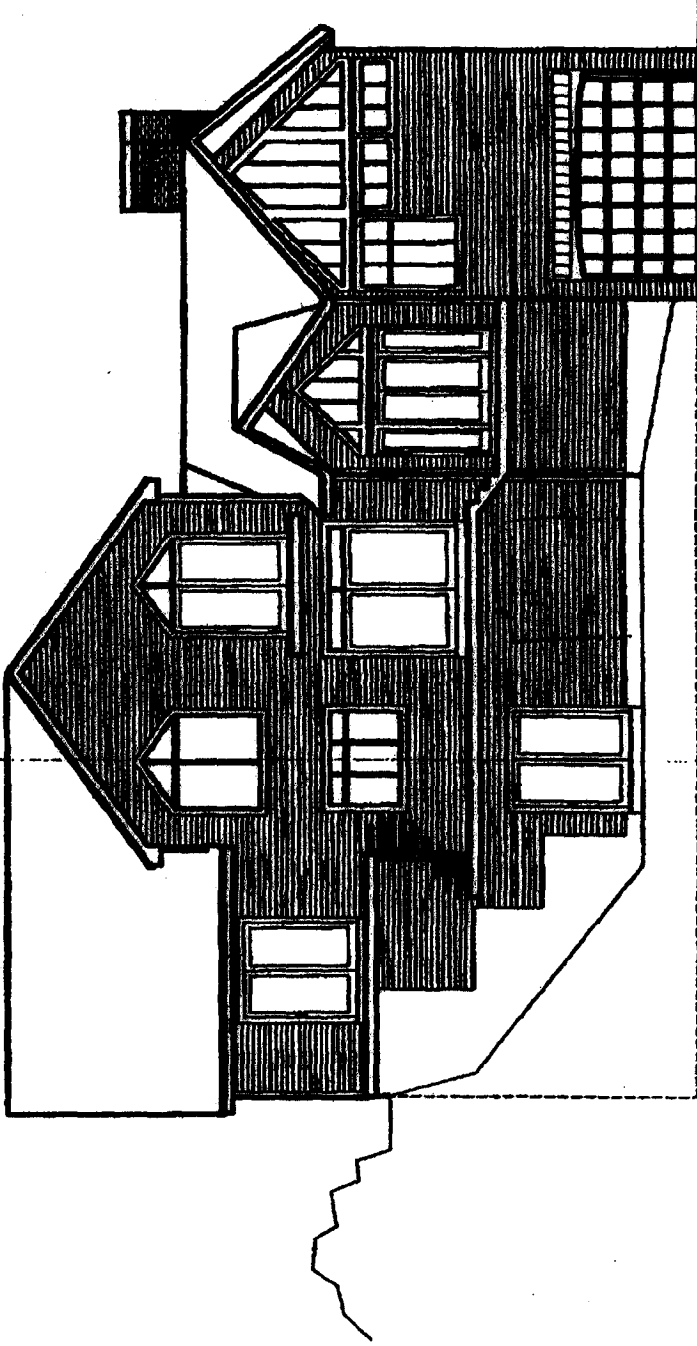
Date

4.20.05

APPLICANT

Date

If different than owner

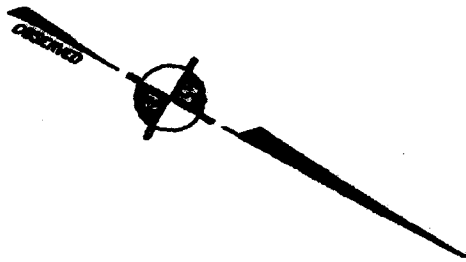


**West (Lakeside) Elevation**

- 1-1/2" x 1-1/2" x 1-1/2"
- 1-1/2" x 1-1/2" x 1-1/2"
- 1-1/2" x 1-1/2" x 1-1/2"
- 1-1/2" x 1-1/2" x 1-1/2"
- 1-1/2" x 1-1/2" x 1-1/2"
- 1-1/2" x 1-1/2" x 1-1/2"

JOEL DAVID  
SILVERWATCH  
No. 2184  
THE STATE OF NEW YORK  
ARCHITECT

**PROPOSED PLOT PLAN**  
**TAX MAP 22 LOT 57, HEMLOCK SHORE DRIVE**  
**ATKINSON, NEW HAMPSHIRE**



**BIG ISLAND  
POND**

APPROX.  
SHORE LINE

EXIST. SHED  
TO BE REMOVE

12" MAPLE

16" PINE

8" MAPLE

10" OAK

14" OAK

**MAP 22  
LOT 57  
11,200± S.F.**

RIGHT-OF-WAY  
N75°09'00"W  
102.00'

BLDG. SETBACK (TYP.)  
32.4'

42.9'

50.0'

50.0'

42.0'

BALCONY

PROPOSED  
BUILDING

16.1'

580°57'00"W  
112.00'

2200-7  
TAX  
MAP  
22



## **EXHIBIT C**



The State of New Hampshire  
**Department of Environmental Services**

Michael P. Nolin  
Commissioner

August 30, 2005



Daniel and Margaret Osborn  
PO Box 808  
Hampstead, NH 03841

RE: File #2005-01071 - Daniel and Margaret Osborn - Atkinson  
Tax Map/Lot # 22 / 57; Block

Dear Mr. and Mrs. Osborn:

The Department of Environmental Services (DES) Wetlands Bureau has completed its review of your application and has determined that the proposed project to extend a deck over the 50 ft primary building setback off a structure erected subsequent to July 1, 1994 does not comply with the Comprehensive Shoreland Protection Act. The application has therefore been denied.

This decision was determined based on the following findings:

**Standards for Approval:**

1. In accordance with RSA 483-B:9, II(b), "Primary structures shall be set back behind the primary building line which is 50 feet from the reference line.
2. In accordance with RSA 483-B:11, I, "Between the primary building line and the reference line, no alteration shall extend the structure closer to the public water, except that the addition of a deck or open porch is permitted up to a maximum of 12 feet towards the reference line."

**Findings of Fact:**

3. On May 5, 2004 the NH Department of Environmental Services received a request for a variance to construct a deck that encroaches 8 ft into the 50 ft primary building line setback off of a new primary structure under construction in 2004 on an undeveloped lot more particularly identified as Atkinson Tax Map 22, Lot 57.
4. As established in RSA 483-B:11, decks can extend up to 12 towards the reference line only if the structure is a nonconforming structure that was erected prior to July 1, 1994. This provision does not allow decks to be constructed, within the primary building setback, to extend from primary structures erected after July 1, 1994.
5. The commissioner may not grant a variance for RSA-B:9 II (b). Variances may only be granted for Section V of RSA 483-B:9 in accordance with RSA 483-B:9 V (g).



**Ruling in Support of the Decision:**

6. The Department does not have the authority to grant a variance to RSA 483-B:11 to allow the construction of a deck, within the setback, off a primary structure constructed after July 1, 1994. Therefore, the request for a shoreland variance to RSA 483-B:11 has been denied.
7. The Department does not have the authority to grant a variance of the primary building setback established per RSA 483-B:9, II(b). Therefore, the request for a shoreland variance to RSA 483-B:9, II(b) has been denied.

You are hereby informed that the appeal of this decision is to the New Hampshire Water Council. Appeal must be made within 30 days of the date of this letter, in accordance with RSA 149-M, RSA 21-O:9 and RSA-O:14. Filing of the appeal shall be made by certified mail to the chairperson of the council, with a copy to the Department, and shall set forth fully every ground upon which it is claimed that the Department's decision is unlawful or unreasonable.

Sincerely,

**COPY**  
  
Michael P. Nolin  
Commissioner  
NHDES

cc: Atkinson Conservation Commission  
Atkinson Board of Selectmen  
Atkinson Municipal Clerk